No. 89-1671

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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CITY OF COLUMBIA and
COLUMBIA OUTDOOR ADVERTISING, INC.,
*Petitioners,*

v.

OMNI OUTDOOR ADVERTISING, INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY BRIEF FOR PETITIONERS

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## TABLE OF AUTHORITIES

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Respondent presents three arguments: (1) that petitioners have waived their present claims because they failed to make proper objections below; (2) that the *Parker* and *Noerr* doctrines do not apply because petitioners "subverted" the governmental process by "agreeing" to ordinances that benefited COA; and (3) that, if proof of corruption is required in this case, the evidence satisfied that standard as well. None of these arguments has merit.

1. Respondent's opening contention is that "[p]etitioners' conduct at trial waived the questions concerning *Parker* and *Noerr-Pennington* they seek to present to this Court." Resp. Br. 25. *See also id.* at 29-31, 43-44. Ironically, respondent has waived its "waiver" claim. To rely

on an argument in this Court, a respondent is required to have raised it at some point below, absent exceptional circumstances not present here. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). Respondent never did so, not even when petitioners moved for judgment n.o.v. on the same grounds that they now advance, *see infra* note 3,[1] or when respondent appealed the district court's entry of judgment n.o.v.[2] Moreover, respondent did not comply with Supreme Court Rule 15.1, which requires that such waiver arguments be raised in the brief in opposition to certiorari or they "may be deemed waived." *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

In any event, the suggestion that *petitioners* have waived their current claims is groundless. The sole basis for this contention is that petitioners "failed to make proper objections to the District Court's legal instructions [to the jury]." Resp. Br. 25. That argument is simply irrelevant in this case, however. Petitioners presented their claims through appropriate legal motions at all required times.[3]

[1] Far from raising a waiver claim, respondent tried to defeat the j.n.o.v. motion on exactly the opposite basis. It argued that petitioners "have based their motion on grounds argued at summary judgment, directed verdict after Plaintiff's case and directed verdict after the close of evidence." Pl. Mem. in Opp. to Mot. for J.N.O.V. (March 20, 1986) at 1.

[2] Respondent asserts that "[t]he Fourth Circuit correctly noted there were no proper objections made to the jury instructions. (Pet. App. 37a)." Resp. Br. 6 (footnote omitted). In fact, however, after addressing petitioners' legal claims on the merits at length, the Fourth Circuit said only the following about the instructions: "Finally, we find no sufficient *merit* to warrant reversal in the defendants' broadside attack on the district court's instructions." Pet. App. 37a (emphasis added).

[3] The City raised the following arguments in the district court: (1) that its conduct was protected because the ordinances, on their face, satisfy *Town of Hallie* (and *City of Boulder* before that), City's Supp. Tr. Mem. (Jan. 18, 1986) at 4-9; Mem. Br. in Support of Def. City's Motion to Dismiss (Dec. 6, 1982) at 5-12; (2) that



These claims sought judgment as a matter of law, not a new trial with proper instructions. They are thus cognizable in this Court regardless of objections to the jury instructions. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) ("the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict") (plurality opinion).[4]

Petitioners' only claim concerning the jury instructions appears in corresponding footnotes in our main brief.

an agreement to enact legislation favorable to COA does not make petitioners "co-conspirators" absent a showing of "illegal or fraudulent inducement by COA of city officials," City's Mem. in Support of Mot. for S.J. (Aug. 8, 1984) at 7-8, or "bribery or other illegal acts," City's Supp. Tr. Mem., *supra* at 8; and (3) that the City's actions were immune regardless of its subjective motive. *Id.* at 6-9. *See also* Mem. in Support of Def. City's Mot. for J.N.O.V. (Feb. 10, 1986). Those arguments were also advanced on appeal. Jt. Br. of Appellees at 13-26.

COA raised the following arguments in the district court: (1) that lawful but successful lobbying activity cannot make petitioners "co-conspirators," COA's Reply Mem. in Support of Mot. for S.J. (Oct. 10, 1984) at 3-7; (2) that even if COA committed illegal acts, such as bribery or slander, its actions are nonetheless protected by *Noerr, id.* at 8-9; and (3) that COA's lobbying cannot constitute a "sham" because it was genuinely intended to influence the City to enact the ordinances, *id.* at 9-10. *See also* COA's Reply to Pl. Supp. Pre-Tr. Mem. (Jan. 8, 1986); COA's Mot. for J.N.O.V. or in the Alternative Mot. for New Tr. or New Tr. Nisi (Feb. 18, 1986); COA's Post-Tr. Mem. (March 10, 1986); COA's Supp. Mem. (June 23, 1986); COA's Second Supp. Mem. (Dec. 6, 1986). Those arguments were also advanced on appeal. Jt. Br. of Appellees at 28-54.

[4] While ignoring *Praprotnik*, respondent mistakenly relies on an earlier case, *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257 (1987). Resp. Br. 29-31. The merits issue in *Kibbe* was whether the jury needed to find the city grossly negligent or something greater (*e.g.*, reckless) to support section 1983 liability in a failure-to-provide-proper-training case. The Court dismissed the writ as improvidently granted for several reasons, including that the city had neither objected to the jury instructions nor raised its objection on appeal, and the court of appeals had thus not considered it. *Kibbe*, 480 U.S. at 260.

Pet. Br. 23 n.23 & 31 n.27. There we argued that, assuming there were a corruption exception to *Parker* and *Noerr*, and assuming the record actually contained sufficient evidence to call that exception into play, a new trial would be required because the instructions were too broad to sustain the judgment on that narrow ground. This claim is also cognizable. Prior to the jury instructions, the trial court had repeatedly ruled that the appropriate legal standard for finding an antitrust "conspiracy" between the City and COA was the existence of an *agreement*, not corruption. *See supra* note 3. Yet another objection by petitioners, raising the same claim at the time of the instructions, would thus have been pointless. Indeed, the district court rejected petitioners' more modest request for an instruction prohibiting liability based on legitimate lobbying efforts.[5] In these circumstances, petitioners' failure to request a "corruption" instruction does not bar them from now raising a conditional new

[5] Petitioners proposed the following instruction:

> You may not infer that any member of the City Council was participating in or acting in furtherance of a conspiracy simply because that person accepted or agreed with a position urged by a party. A public official's communications with a constituent, even if that public official thereby is influenced to favor the constituent, is within the parameters of the legislative process and cannot violate the antitrust laws so long as the official's activities are not the product of an illegal arrangement.
>
> Likewise, you may not infer that any member of City Council was acting in furtherance of an illegal arrangement or conspiracy merely because that official may have received campaign contributions from COA.

Defendants' Proposed Instruction 19 (Exh. O to COA's Mot. for J.N.O.V. (Feb. 18, 1986)). *See also* J.A. 172-73 (similar instruction concerning COA's liability).

Petitioners also objected to the instructions actually given, claiming that they allowed the jury to find a conspiracy based on a successful lobbying effort. J.A. 109-10. The district court denied the objection even as it stated, "I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy." *Id.* at 112.



trial claim. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2553, at 639-40 & n.55 (1971) (collecting cases); *cf. Praprotnik*, 485 U.S. at 119-20.

2. Respondent next argues that *Parker* and *Noerr* do not apply here because there is evidence "rebut[ting] the presumption that government acts in the public interest." Resp. Br. 33 (citations omitted). *See also id.* at 37. To uphold the verdict on that ground, in turn, respondent claims that the record supports the following conclusions: (a) that the City acted "solely to further COA's commercial purposes to the detriment of competition"; (b) that petitioners entered into "agreements . . . to forc[e] competitors from a particular market"; and (c) that petitioners' efforts were a "sham," designed to "harass" respondent and "deny it a meaningful access to the appropriate city administrative and legislative fora." Resp. Br. 41-42.[6] This approach, as we explained in our opening brief, is inconsistent both with this Court's decisions and with the policies animating *Parker* and *Noerr*. *See* Pet. Br. 12-20, 24-25.[7]

[6] The "evidence" that respondent cites in support of these propositions is presented in a misleading, if not inaccurate, manner. For example, respondent asserts that "COA knew of the upcoming moratorium change, while OMNI did not." Resp. Br. 19. To support this claim, respondent notes that between March 9 and March 24, 1982, COA obtained permits for ten new billboard locations. The record also demonstrates, however, that (1) during precisely the same period Omni received *twelve* new permits in anticipation of the moratorium, C.A. App. 3619-30, and (2) the moratorium prohibited both COA and Omni from exercising these recently acquired permits, *id.* at 3771-76. Respondent's accusations that the City knew the moratorium ordinance was unconstitutional when it was passed, Resp. Br. 12, 16, and that "COA [was allowed] tax advantages to the detriment of the City," *id.* at 12, are also incompatible with the record. *See* C.A. App. 1753-55, 1880, 2042-43.

[7] *Amicus curiae* Associated Builders and Contractors, Inc. ("ABC") makes essentially this same argument, but limits it to *Parker* immunity. *See* ABC Br. 3 ("intent to serve the public interest"). To support its position, ABC relies on a sentence from *Town of Hallie* stating "[w]e may presume, absent a showing to the con-

To support its contrary conclusion, respondent relies almost exclusively on the Court's recent decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), which held that when "an economically interested party exercises decisionmaking power in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any liability flowing from the effect the standard has *of its own force* in the marketplace." *Id.* at 509-10 (emphasis added). That holding, however, does not even apply to *Parker* immunity and, as to *Noerr*, it cannot be stretched to cover the very different case of a private party that seeks passage of a protective ordinance, where the harm to competitors results *solely* from the adoption of the ordinance. On the contrary, the Court in *Allied Tube* expressly distinguished the two situations, explaining that there was no basis for according private standard-setting organizations "the same wide latitude given [even] ethically dubious efforts to influence legislative action in the political arena." 486 U.S. at 504; *see also id.* at 502. Thus, *Allied Tube* supports petitioners' position, not respondent's.[8]

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trary, that the municipality acts in the public interest." *Id.* at 6 (quoting 471 U.S. at 45). But the whole thrust of the Court's decision in that case was to emphasize the need for *objective*, nonintrusive antitrust standards so that municipal officials would not be deterred from doing their jobs. *See* Pet. Br. 14-18. One general statement, noted in passing, does not undo the opinion's basic rationale.

ABC takes a different tack with respect to *Noerr*, arguing that, even when petitioning is successful, it may still be a sham if its purpose was to delay, not prevail. ABC Br. 13-20. The argument has no relevance here, however. There is no question that COA's efforts were genuine and that the harm to respondent resulted not from the effects of the government process itself, but rather from the outcome of that process—*i.e.*, the passage of the ordinances. *See* C.A. App. 1243; *see also* Pet. App. 33a.

[8] Respondent also argues that "Congress . . . has recognized that municipalities may subject themselves to antitrust liability for their anticompetitive behavior." Resp. Br. 40 (citing 15 U.S.C. §§ 34-36). It is clear, however, that this statute did not establish *substantive* standards for antitrust liability of municipalities or, indeed, endorse any such liability. *See* H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603 ("the bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law").



3. Respondent's final argument is that "corruption of the governmental process sustains the judgment." Resp. Br. 42. This argument is flawed in two respects. To begin with, it glosses over the fundamental question whether there is a proper basis for creating a corruption exception to *Parker* and *Noerr* in the first place. Pet. Br. 14-20, 24-30. Second, even assuming that such an exception were warranted, it would not have been satisfied by the evidence in this case.

Respondent attempts to avoid having to justify a corruption exception by asserting, first, that "[p]etitioners themselves concede that proof of what they call 'direct corruption' . . . would negate *Parker*." Resp. Br. 43. *See also* Resp. Br. 48 n.35 (stating that petitioners concede that "illegal advocacy [is] not protected by the 1st Amendment"). Far from conceding these points, however, we

Respondent's reliance on Professor Areeda's treatise is likewise improper. To create an impression of support, respondent first omits (without ellipsis) the word "necessarily" from the treatise's statement that: " 'Conspiracy' is not necessarily inapt [in certain specific circumstances described below]." *See* Resp. Br. 38-39 (citing P. Areeda & D. Hovenkamp, *Antitrust Law* ¶ 203.3c (Supp. 1987). It then leaves out the critical explanation that goes with the modifier: "To say that a conspiracy notion is not totally inapt is not, of course, to recommend that bribes, personal financial interest, or personal bias should be grounds for antitrust liability. Bribes may be provable although antitrust remedies may not be the most appropriate vehicle. Personal financial interest is also provable, although conflict of interest regulation seems more suitable than antitrust liability. Personal bias is so inherently unprovable that it should be ignored altogether." P. Areeda & D. Hovencamp, *supra* ¶ 203.3c, at 33-34.

explicitly argued to the contrary. *See* Pet. Br. 18-20, 27.[9] Next, respondent states that in *Allied Tube* "this Court recognized bribery or corruption of governmental process as being within the sham exception to *Noerr-Pennington*, 486 U.S. at 504." Resp. Br. 42. *See also id.* at 42-43 (quoting 486 U.S. at 502). But that view is simply not supported by the Court's opinion, either at the pages cited by respondent or anywhere else.[10]

Even assuming there were a corruption exception to *Parker* and *Noerr*, moreover, it would not apply here because the evidence does not support such a finding.[11] Respondent points to a handful of campaign contributions

[9] Respondent similarly confuses the dissent below, asserting that it recognized a corruption exception. Resp. Br. 43. In fact, the dissent expressed some "doubt" about the issue, but felt no need to resolve it because the record contained no "proof of an illegal act or a selfish or a corrupt motive on the part of Columbia city officials." Pet. App. 48a.

[10] On the contrary, *Allied Tube* indicated that the "sham" exception does *not* apply where, as here, an individual genuinely attempts to achieve a favorable governmental decision, even if he uses improper methods. 486 U.S. at 507 n.10. Moreover, the only thing that *Allied Tube* said about a potential co-conspirator exception—an issue that was not presented in that case—is that, in yet another case, the Court had stated "*in dicta* that '[c]onspiracy . . . or bribery . . .' *may* violate the antitrust laws." 486 U.S. at 502 n.7 (second emphasis added) (citation omitted).

[11] Respondent never defines the actions that would fall within its "corruption" exception. Instead respondent variously lists "abandonment of public responsibilities to private interests," "bribery," and "illegal or fraudulent actions, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners" as potential components of such an exception. Resp. Br. 42-43. Apparently still unable to ensure that the exception would cover petitioners, respondent ultimately concludes: "At bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." *Id.* at 43. This attempt to transform *Parker* and *Noerr* into an open-ended, obscenity-like standard, *see Miller v. California*, 413 U.S. 15, 25 (1972), is fundamentally misguided.



that COA or its executives gave to city officials over a six-year period and claims that they prove corruption. Resp. Br. 25, 46. The contributions at issue, however, were authorized by South Carolina law, openly reported on each candidate's Campaign Disclosure Form, small in amount, and fully consistent with COA's general policy regarding contributions to charitable organizations and public officials.[12] These circumstances do not warrant a hint of suspicion, let alone a finding of corruption.[13]

[12] In addition to three cash contributions (ranging from $50 to $140), Pet. Br. 6 n.6, COA provided the Mayor with six free billboards in 1978, which he disclosed on his Campaign Disclosure Form. C.A. App. 3263. This contribution is consistent with COA's general practice of providing hundreds of free billboards each year to clients, politicians, and charitable organizations, such as the Red Cross, United Fund, Shriner's Burn Hospital, and the Girl Scouts. *Id.* at 1421-22. It is also a standard practice in the industry, followed as well by respondent. *Id.* at 436-38.

After this suit was filed, two of the councilmen purchased billboard space from COA. Both were charged somewhat less than the price reflected on COA's rate card—at most, a one-third discount, amounting to approximately $250. *Compare id.* at 2760-61 *with id.* at 2922, 3216. This practice is also customary in the industry, *see id.* at 1629-30, 1646-47; in fact, the discounts provided to these councilmen were the same as or less than those given by COA to other clients. *See id.* at 1524; *compare id.* at 2762, 2765, 2863 *with id.* at 2760-61. Both councilmen reported the amounts paid to COA for the billboards as itemized expenditures on their Campaign Disclosure Forms. *Id.* at 3254, 3256.

[13] Respondent's reliance on *United States v. McCormick*, 896 F.2d 61, 66 (4th Cir.), *cert. granted*, 59 U.S.L.W. 3211 (U.S. Oct. 1, 1990), to suggest that the facts in this case would support a Hobbs Act, 18 U.S.C. § 1951, conviction is inappropriate. In that case, after a lobbyist was contacted by a government official complaining that "his campaign was expensive, that he had not 'heard from' [the lobbyist's clients]," *id.* at 63, the lobbyist hand-delivered five successive cash payments totaling several thousand dollars that were never reported as campaign contributions by either the candidate or the lobbyist, as required by state law. Although the Fourth Circuit upheld the conviction, it recognized that, even on those facts, the case ultimately turned on a "fine distinction" between legitimate campaign contributions and a violation of the Hobbs Act. *Id.* at 65.

Apparently aware of its inability to support a corruption finding based on the evidence, respondent seeks to fill the gap by arguing that "[a]s members of the same community as Petitioners, moreover, the jurors may well have understood that corruption is a way of life in political South Carolina." Resp. Br. 47 (footnote to Hobbs Act investigation of several South Carolina legislators). But that kind of "guilt by association" argument is as speculative as it is offensive. Respondent argued to the jury that corruption was not required (indeed, that the purest of motives would not be a defense here), J.A. 59; moreover, the jury was never instructed that it had to find corruption to rule for respondent, *see* J.A. 78-79. Thus, in no event could the verdict be affirmed on the basis of a corruption finding.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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